SUPREME COURT, U. S.

FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 594

ARTHUR LEVIN,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. ------

ARTHUR LEVIN,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

OPINION

The opinion of the Court of Special Appeals of Maryland is reported in 246 Md. 139. The Petition for Writ of Certiorari in the Court of Appeals of Maryland, was denied by Order of the said Court signed by Chief Judge Hall Hammond on June 13, 1967.

JURISDICTION

The mandate of the Court of Special Appeals of Maryland was filed on May 10, 1967, shown in the transcript of record, and the opinion of the Court was filed on the same date, a copy of which is set forth in the Appendix, page 11. The Petition for Writ of Certiorari to the Court of Appeals of Maryland and the Order of the Court of Appeals of

Maryland denying same dated June 13, 1967 is also set forth in the Appendix, pages 17 and 20 respectively. The jurisdiction of this Court is invoked under the Provisions of Title 28, United States Code, Section 1257 (3).

QUESTIONS PRESENTED

1. Is the Law of the State of Maryland as codified in Article 27, Section 418 of the Annotated Code of Maryland, (1957 Edition), constitutional?

2. Are the photographs or pictures in question, obscene, as defined by this Honorable Court?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment One of the Constitution of the United States, reads in part as follows:

> "Congress shall make no laws * * * abridging the freedom of speech, or of the press; * * *".

Amendment Fourteen of the Constitution of the United States, reads in part as follows:

> "* * * No State shall make or enforce any law that shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life; liberty, or property, without due process of law; * * *"

Article 27, Section 418, Code of Public General Laws of Maryland (1957 Edition), reads as follows:

> "§ 418. Sale, exhibition, etc., of lewd, obscene or indecent books, pamphlets, drawings, etc.
>
> (a) Offense Defined. — If any person shall knowingly bring or cause to be brought into this State for exhibition, or sale, or shall sell, rent, or give away or offer to give away, or show or have in his or her possession with intent to sell or give away or to exhibit, show,

advertise or otherwise offer for loan, gift, sale or distribution any lewd, obscene or indecent book, magazine, pamphlet, newspaper, story paper, writing paper, picture, card, drawing or photograph, or any article or instrument of indecent or immoral use, or shall design, copy, draw, photograph, print, utter, publish or prepare such book, picture, card, drawing or paper or other article, or shall write or print or cause to be written or printed any circular, advertisement or notice of any kind, or giving information orally, stating when, where, how or of whom or by what means such a lewd, indecent, or obscene article or thing can be purchased, seen or obtained, shall in every such case be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding $200.00 or shall be imprisoned not exceeding one year, or be both fined and imprisoned in the discretion of the Court; provided, that this section shall not apply to any person committing the acts thereby prohibited with intent to prevent violations of this sub-title or to procure the punishment of offenses against the same."

STATEMENT

The Petitioner has a book store in Baltimore City, Maryland, wherein he sells books, magazines and pictures to the general public. He does not allow anyone in the store under the age of twenty-one (21) years.

The Petitioner was indicted by the Grand Jury of Baltimore City in a two count Indictment based on the provisions of Article 27, Section 418, Code of Public General Laws of Maryland (1957 Edition), which Section is set forth above.

The first count of the Indictment charged the Petitioner with having in his possession "with intent to sell, certain lewd, obscene and indecent pictures of certain male persons whose names are to the jurors aforesaid unknown, * * *". The second count of the Indictment charged the

Petitioner "unlawfully did sell certain lewd, obscene and indecent pictures, of certain male persons whose names to the jurors aforesaid are unknown, * * *".

The case was tried before the Court without a Jury. The pictures were introduced into evidence, and several witnesses were called, including Lincoln Johnson, who holds a PHD degree and is a Professor in the History of Art Department at Goucher College, in Towson, Maryland; Audrey Bodine who is a Photographic Director of the Sunday Sun and a well known photographer in Baltimore, Maryland; Robert F. Forth who is the Vice-President and Dean of the Maryland Institute, a well known Art School in the Baltimore Metropolitan area; and Barbara Gold, who writes an Art Column for the Sunday Sun and is considered an Art Critic. All of these witnesses testified to the fact that the photographs or pictures had no artistic merit or redeeming social value. However, all of the witnesses testified that they did not believe that the pictures would appeal to the prurient interest in sex of the average person although all of the witnesses did feel that they were repulsed by what they saw and further that they felt the pictures would be repulsive to all who viewed them.

At the end of the State's case Motions for Directed Verdict of Acquittal were made and denied, and the Motions were renewed after the defendant rested his case, and again denied. The Petitioner was convicted and sentenced to serve one year in jail and pay a fine of Two Hundred ($200.00) dollars, being the maximum penalty by the statute.

Thereafter an Appeal was taken to the Court of Special Appeals of Maryland which sustained the lower Court, and subsequently a Petition for Writ of Certiorari to the Court

of Appeals of Maryland, the highest Court of the State, was filed and the same denied.

REASON FOR GRANTING THE WRIT

IS THE STATUTE UNDER WHICH THE DEFENDANT WAS CONVICTED, CONSTITUTIONAL?

The First Amendment to the Constitution of the United States, guarantees freedom of speech and press to the individual citizen as against the Federal Government. By the adoption of the Fourteenth Amendment to the Constitution, and several interpretations made by this Court, it has been held that the Fourteenth Amendment to the Constitution cannot be abridged by the State Government. See *Gitlow v. New York*, 268 U.S. 625 (1925); *Fiske v. Kansas*, 274 U.S. 380 (1927) and *Near v. Minnesota*, 283 U.S. 697.

The Statute under which the Petitioner herein was convicted, Article 27, Section 418 of the Annotated Code of Maryland, (1957 Edition) is set out in full on page 2 under Constitutional Provisions and Statutes.

The question then arises whether or not the State has the right under the First and Fourteenth Amendments to the Constitution to pass any laws that abridge the right of free speech and press. It is your Petitioner's contention that the State has no right under the Constitution of the United States to pass any laws regulating the freedom of speech or press, that would fall outside of the "clear and present danger doctrine" and further, that even under the clear and present danger doctrine, the State must show that individuals will be aroused to riot or that the speaker or literature is advocating anarchy. It is your Petitioner's contention that under no other circumstances may the State legally adopt any law that will suppress freedom of speech or press, including laws pertaining to obscenity.

This contention is not without merit, for in the case of *Redrup v. State of New York, Austin v. State of Kentucky,* and *Gent, et al v. State of Arkansas,* all consolidated in the October Term, 1966 of this Honorable Court, the decision being rendered on May 8, 1967, and reported in 87 S. Ct. 144, it was said in dictum that:

> "Two members of the Court have consistently adhered to the view that the State is utterly without power to suppress, control or punish, the distribution of any writings or pictures upon the grounds of their 'obscenity'. A third has held to the opinion that a State power in this area is now only limited to a distinct and poorly identifiable class of material. Others have subscribed to a not dissimiliar standard, holding that a State may not constitutionally inhibit the distribution of literary material as obscene unless (a) the dominant theme of the material taken as a whole appeals to the period interest in sex; (b) the material is patently offensive because it affronts the contemporary standards relating to the description or the representation of sexual matters; and (c) the material is utterly without redeeming social value, emphasizing that the 'three elements must coalesce' and no such material can 'be proscribed unless it is found to be utterly without redeeming social value' ".

It is contended that the power of the State to abridge freedom of speech and of the press is the exception rather than the rule, and that the Legislature may not under the guise of police power, arbitrarily or unnecessarily interfere with the freedom of speech and of press. No contention is made that the State may not, under the police powers, punish an abuse of free speech or press by those who would fall within the realm of the clear and present danger doctrine for inciting to riot or advocating anarchy, but certainly, there can be no clear present danger in the sale of pictures be they obscene or not. The only basis upon

which this statute may stand constitutionally, is a finding by this Court that the control of "obscenity" is within the police power of the State, even though the same may abridge the constitutional guarantees of the First and Fourteenth Amendments.

There have been many cases tried on the obscenity statutes as enacted by the many Legislatures of the various States. In general, all of the Courts have said that the statutes can only be valid if there is a clear and present danger to the general public. Certainly the sale of pictures cannot be considered as presenting a clear and present danger to the public morals.

All persons of any stature today realize that it is impossible to regulate public morals by law. Although many acts are considered illegal because of statute, in many instances the Legislature realizes the insignificance of the crime by the penalty imposed. Thus in Maryland, the crime of adultery as set forth in Article 27, Section 4 of the Annotated Code of Maryland, provides for a fine of Ten Dollars ($10.00) upon conviction. The tendency today has been to liberalize thinking along the lines of sexual behavior, as in England there has been a long study and an eventual repeal of laws that made homosexuality a crime.

It is your Petitioner's belief that the State should not be permitted to control what pictures or photographs an individual may view. For it is preposterous to say that the paintings of the great masters hanging in the many Art Galleries and Museums of the world, which depict nudes in various forms and poses are not obscene while a photograph of a nude is obscene. What constitutes obscenity is in the mind of the beholder, not the object per se.

It is respectfully submitted that the statute under which the Petitioner herein was convicted is unconstitutional,

in that it abridges the right of freedom of speech and press as guaranteed in the Constitution of the United States.

ARE THE PHOTOGRAPHS OR PICTURES IN QUESTION, OBSCENE?

In the last few years, this Court has reviewed many convictions of persons charged with various degrees of selling pornographic literature. In the case of *Roth v. U.S.*, 354 U.S. 476 (1957), this Court laid down specific guide lines in determining whether certain matter was in fact obscene under the law. In the later case of *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 82 S. Ct. 1432 (1962), a case involving the Post Office's refusal to permit certain magazines consisting largely of photographs of nude or near nude male models to be sent through the mails, this Court, on page 489, said:

> "At least one important State Court and some authoritated commentators have considered Roth in subsequent cases to indicate that only 'hard core' pornography can constitutionally be reached under this or similar state obscenity statutes, (cases cited)".

Your Petitioner believes, that if the State can constitutionally pass a statute to control "pornographic literature", that this may only be done for "hard core" pornography. Your Petitioner does not believe that the photographs in question here constitute hard core pornography, and therefore on this basis his conviction must be reversed.

CONCLUSION

In summing up the two questions raised by your Petitioner, it is his contention that:

1. The State has no right to pass a law which will limit freedom of speech or press in matters pertaining to obscenity.

2. That the pictures or photographs upon which your Petitioner was convicted are not obscene or pornographic according to the guide lines as set up by this Honorable Court.

Your Petitioner respectfully submits that the Court of Special Appeals of Maryland has erroneously sustained the determination of guilt of your Petitioner, which determination has been affirmed by the Court of Appeals of Maryland, by its refusal to review the conviction on Certiorari, and thus, has denied your Petitioner his constitutional rights.

WHEREFORE, your Petitioner prays that this Petition for Writ of Certiorari be granted; that a review of the cause herein be made by this Honorable Court, and that the judgment of the Special Court of Appeals of Maryland and the Court of Appeals of Maryland be reversed as to the issues before this Honorable Court, and for such other relief in this cause as this Honorable Court shall deem just.

Respectfully submitted,

FRANK B. CAHN II,

PAUL A. DORF,

Attorneys for Petitioner.

APPENDIX

In The Court of Special Appeals of Maryland

Initial Term, 1967

No. 54

Arthur Levin

v.

State of Maryland

Before: Anderson, Morton, Orth, Jenifer, Walter M. (Specially Assigned), Macgill, James (Specially Assigned), JJ.

Opinion by Orth, J.

Filed: April 10, 1967

Appellant, owner and operator of the "Baltimore Book Bizarre" (sic), a book store located at 224 West Baltimore Street in Baltimore City, was convicted by the Criminal Court of Baltimore, of violating Code (1966 Cum. Supp.) Article 27, section 418 a, which makes it a misdemeanor for any person to "knowingly * * * sell * * * any lewd, obscene, or indecent * * * photograph." The subject matter of the prosecution was three sets of photographs, from which three photographs and the receipt for the purchase price were admitted in evidence without objection. The photographs, three to a set, were on the counter of the store. Two sets were purchased for $5.00 each and the third for $4.00 by a member of the Baltimore Police Department, Rackets Division. The photographs in evidence are of one type, each being of a young man, two being completely naked, the third wearing only an under-

shirt. Each man is distinguished by a large penis in full erection. In one photograph, the subject, in profile, is fondling his penis, in another the subject, in profile, is reclining on his back and in the third the subject is standing full face to the camera. Appellant concedes the photographs are utterly without redeeming social value, but urges that the State has not established that the other two elements set forth under the *Roth-Alberts* test of obscenity coalesce. *Roth v. United States*, 354 U.S. 476 (1957), reiterated in *Jacobellis v. Ohio*, 378 U.S. 184 (1964), and summarized in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General* (the "Fanny Hill" decision), 383 U.S. 413, 16 L. Ed. 2d 1 (1966). These two elements are (a) the dominate theme of the material taken as a whole appeals to a prurient interest in sex, and (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters. The Court denied a motion for judgment of acquittal at the conclusion of the State's case and the defense proffered no testimony. Appellant, in effect, contends:

i) The evidence was not legally sufficient to support the conviction.

ii) The statute under which appellant was charged and convicted is unconstitutional for failure to require *scienter*.

Embraced in the first contention are two questions presented by appellant:

a) Should the lower court have granted the appellant's motion for judgment of acquittal?

b) Did the lower court correctly apply the controlling law as set out in *Roth v. United States*, supra, as elaborated and in one respect adjusted by *Miskin v. New York*, 86 Sup. Ct. 958 (1966)?

To sustain the conviction under *Code*, Article 27, section 418 a, the words, "lewd," "obscene," and "indecent" must be defined under the standards set forth in *Roth-Alberts*

and the photographs must be found to be obscene by those standards. We feel that the Maryland Legislature intended, by its use of these words in the statute, what the words meant in prevailing leading legal thought. Since these cases were tried by the court sitting without a jury, we have the right to review them on both the law and evidence to determine whether in law the evidence was sufficient to sustain the conviction, though we may not set aside the verdict on the evidence unless it is clearly erroneous. *Maryland Rule* 1086 a; *Monfred v. State,* 226 Md. 312 (1961); *Yudkin v. State,* 229 Md. 223 (1962). However, we are mindful of our obligation to make a reflective, independent judgment on the facts of the case and that *ordinarily* neither the judge who may sit in the lower court nor the judges of this Court would be qualified to determine whether the photographs fail to meet the standards laid down in *Roth-Alberts* without enlightening testimony. *John Sanza v. Maryland State Board of Censors,* ..... Md. ....., September Term, 1966, filed February 8, 1967. See also the dissenting opinion of Judge (now Chief Judge) Hammond in *Monfred v. State,* supra. But we feel that the photographs in the instant case, which are conceded to be without redeeming social value, are such as to which no proof, other than the viewing of them, is required to determine what they are, in fact, obscene. *Dunn v. Maryland Board of Censors,* 240 Md. 249 (1965). The exhibits of the allegedly obscene material speak for themselves and must in every case be perused and examined with care. We have done so and find them to be hard-core pornography. This does not mean that other competent evidence to show them to be *not* obscene should be excluded as irrelevant or immaterial. *Yudkin v. State,* supra. Chief Justice Warren, in the dissenting opinion in *Jacobellis v. Ohio,* supra, in which Justice Clark joined, observed that hard-core pornography is difficult to define. In the same case, Justice Potter Stewart, who feels that only hard-core pornography may be proscribed under the First Amendment, said that perhaps he could never intelligently describe the kinds of material embraced within the term but that he knows it when he sees it. Footnote 4 in the

dissenting opinion of Judge Hammond in *Monfred v. State*, supra, sets forth the description of hard-core pornography given by the Solicitor General of the United States:

> "This is commercially produced material in obvious violation of present law * * *. There is no desire to portray the material in pseudo-scientific or 'arty' terms."

He quotes D. H. Lawrence who wrote in *Pornography and Obscenity in Sex Literature and Censorship* (1953):

> "But even I would censor genuine pornography, rigorously. It would not be very difficult. In the first place, genuine pornography is almost always underworld, it doesn't come into the open. In the second, you can recognize it by the insult it offers, invariably, to sex, and to the human spirit.
>
> "Pornography is the attempt to insult sex, to do dirt on it. This is unpardonable. Take the very lowest instance, the picture postcard sold underhand, by the underworld, in most cities. What I have seen of them have been of an ugliness to make you cry. The insult to the human body, the insult to a vital human relationship! Ugly and cheap they make the human nudity, ugly and degraded they make the sexual act, trivial and cheap and nasty."

It has also been said that hard-core pronography is material which "focuses predominantly upon what is sexually morbid, grossly perverse, and bizarre without any artistic or scientific purpose or justification." *People v. Richmond County News, Inc.*, 175 N.E. 2d 681, 686 (N.Y. 1960). Mere nudity, in and of itself, is not obscene nor are sex and obscenity synonymous. *Sanza v. Maryland*, supra; *Monfred v. State*, supra. The photographs in the instant case do not merely depict nude males. They are more than vulgar, cheap, crude and in poor taste. We feel that these photographs are one of the exceptional cases considering the posture and position of the subjects, the calculated emphasis on and highlighting of the genital area with the penis in erection, the complete lack of

caption or text, the patent absence of any redeeming social value, so as not only to speak for themselves, but scream for all to hear that they are obscene. They go substantially beyond customary limits of candor and deviate from society's standards of decency in the representation of the matters with which they deal. They offer insult "to sex, and to the human spirit"; they make human nudity ugly and cheap. They are not designed to be a truthful description of the basic realities of life as the individual experiences it; their main purpose is to stimulate erotic response. It has been suggested that to be hard-core pornography, there must be explicitly illustrated incidents of sexual activity, normal or perverted, involving some "act". Examples are given of the "comic books" specially drawn for the pornographic trade, and motion pictures showing "people of both sexes engaged in orgies which * * * include every form of sexual activity known, all of which are presented in a favorable light." We do not agree. We feel that the photographs in the instant case depict a sufficient "act", assuming such is necessary, to be flagrant erotica and render them hard-core pornography. We note in passing, that although the Supreme Court has not fully accepted the "variable obscenity" concept expressed by Chief Justice Warren in the concurring opinion in *Roth-Alberts* to the effect that the question of obscenity must turn, not on the material itself, but on the motives of the seller, the sales in the instant case were unquestionably commercial and that a variable obscenity test could have been applied. Cf. *Ginzburg v. United States*, 383 U.S. 463, 16 L. Ed. 2d 31 (1966).

Thus having made a reflective, independent appraisal that the photographs are obscene, we are unable to say that the trial court was in error in denying the motion for a judgment of acquittal or was clearly in error as to the evidence convicting the appellant of "knowingly" selling the obscene photographs. Nor did the lower court reach the wrong conclusion as to the law.

Maryland Rule 1086 a.

ii

Appellant's second contention is without merit. He alleges that the statute fails to require *scienter*. The 1960 amendment to the *Maryland Code*, Article 27, section 418 a, added the word "knowingly" and thus requires guilty knowledge. As it, in fact, requires *scienter*, it cannot be said to be unconstitutional for failure to require it.

Appellant also contends he did not know the material sold by him was obscene and could not have known until it was so adjudicated. The Court of Appeals said in *Sanza v. Maryland*, supra, that the term "obscene" is "not susceptible of definition, any more than is the loftier concept of due process of law, but it is an inherent part of our system of constitutional government that broad concepts take on definite meaning only as the ground covered by the concept is marked out case by case." It is true that the term "obscene" is not precise, but lack of precision is not of itself offensive to the requirements of due process. The Constitution does not require impossible standards. All that is required is that the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. We have noted that the test of obscenity is as summarized in the "Fanny Hill" decision and that the Maryland Legislature, in enacting the law, intended obscenity to mean the prevailing leading legal thought. The term, applied according to this standard, gives adequate warning of the conduct proscribed and marks boundaries sufficiently distinct for judges and juries farily to administer the law. The statute, applied according to this standard, does not offend constitutional safeguards against convictions based upon protected material, and does not fail to give men, in acting, adequate notice of what is prohibited. *Roth v. United States*, supra.

JUDGMENT AFFIRMED.

APPELLANT TO PAY COSTS.

In The
Court of Appeals of Maryland

Arthur Levin,

Plaintiff,

v.

State of Maryland,

Defendant.

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Judge of said Court:

Now comes Arthur Levin, by Frank B. Cahn II, Paul A. Dorf, Pollack & Cahn, his attorneys, and respectfully shows as follows:

1. That jurisdiction in this matter is based upon the provisions of Article 5, Sec. 21A, Annotated Code of Maryland, 1957 Edition, as amended, Review of Decisions of Court of Special Appeals.

2. That your Petitioner was indicted by the Grand Jury of Baltimore City in the January Term, 1966, in Indictment No. 259, and charged with violating Article 27, Sec. 418a, Annotated Code of Maryland, 1957 Edition, as amended, which states as follows:

> "Offense defined. — If any person shall knowingly bring or cause to be brought into this State for sale or exhibition, or shall sell, lend, give away or offer to give away, or show or have in his or her possession with intent to sell or give away, or to exhibit, show, advertise or otherwise offer for loan, gift, sale or distribution any lewd, obscene or indecent book, magazine, pamphlet, newspaper, story paper, writing paper, picture, card, drawing or photograph, or any article or instrument of indecent or immoral use, or shall design, copy, draw, photograph, print, utter, publish or prepare such book, picture, card, drawing, paper or other article, or shall write or print or cause to be

written or printed any circular, advertisement or notice of any kind, or giving information orally, stating when, where, how or of whom or by what means such a lewd, indecent or obscene article or thing can be purchased, seen or obtained, shall in every such case be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding two hundred dollars or shall be imprisoned not exceeding one year, or be both fined and imprisoned in the discretion of the court; provided, that this section shall not apply to any person committing the acts thereby prohibited with intent to prevent violations of this subtitle or to procure the punishment of offenses against the same."

3. That on March 14, 1966, your Petitioner was tried on a plea of not guilty before the Honorable J. Gilbert Prendergast, Associate Judge, Supreme Bench of Baltimore City, and found guilty of the second count of the Indictment which states as follows:

Second Count.

And the jurors aforesaid, upon their oath aforesaid, do further present that Arthur Levin of said City, on the said day, in the said year, at the City aforesaid, unlawfully did sell said lewd, obscene and indecent pictures, of certain male persons whose names are to the jurors aforesaid unknown, contrary to the form of the Act of Assembly in such case made and provided, and against the peace, government and dignity of the State."

4. That thereafter, on April 4, 1966, an Appeal to the Court of Appeals of Maryland was filed, and, pursuant to provisions of Article 26, Sec. 130, Code of Public General Laws of Maryland, 1957 Edition, as amended, the case was transferred to the Court of Special Appeals of Maryland for the Initial Term, 1967, being Appeal No. 54.

5. That thereafter on March 9, 1967, the case was argued before the Court of Special Appeals of Maryland, and on

April 10, 1967, an Opinion was rendered by the Honorable Charles E. Orth, Associate Judge of the Court of Special Appeals of Maryland, wherein he affirmed the decision of the Lower Court.

6. That on May 10, 1967, the Mandate of the Court of Special Appeals of Maryland was returned to the Criminal Court of Baltimore City.

7. That since the argument of this case and the Opinion rendered, the Supreme Court of the United States, on May 8, 1967, made certain rulings in three cases based upon the guarantees of the First and Fourteenth Amendment of the United States Constitution.

8. Your Petitioner believes, and therefore avers, that the law set out by the Supreme Court of the United States materially affects the guidelines for determining obscenity, as well as changing substantially the right of the state to inhibit the distribution of certain printed materials in violation of the guarantees of the Constitution of the United States.

9. That your Petitioner is not filing this Writ of Certiorari for the purposes of delay, but honestly and sincerely believes that the guidelines set down by the Supreme Court of the United States in the cases of Robert Redrup, Petitioner, v. State of N. Y.; William L. Austin, Petitioner, v. State of Kentucky and Gent, et al, Appellants v. State of Arkansas, Appeal Nos. 3, 16, and 50 of the October Term, 1966, respectively, will materially affect the decision rendered in this case.

Respectfully submitted,

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In The
Court of Appeals of Maryland

Misc. Docket No. 12

September Term, 1967

(No. 54 — Initial Term, 1967 Court of Special Appeals)

Arthur Levin

v.

State of Maryland

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED by the Court of Appeals of Maryland that the said petition be, and it is hereby, denied.

/s/ HALL HAMMOND,
Chief Judge.

Date: June 13th, 1967.

SUPREME COURT. U. S.

JAN 3 1968

JOHN F. DAVIS, CLERK

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OCTOBER TERM, 1967

No. 594

ARTHUR LEVIN,

Petitioner,

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STATE OF MARYLAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 594

ARTHUR LEVIN,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

1. Was the Petitioner convicted under an unconstitutional Maryland statute for the sale of obscene pictures?

2. Were the pictures determined to be obscene by constitutional standards?

STATEMENT OF THE CASE

The Petitioner, owner of the Baltimore Book Bizarre (sic), a bookstore in downtown Baltimore, was convicted in the Criminal Court of Baltimore of a violation of Article 27, Section 418(a), of the Annotated Code of Maryland (1957 Edition) for the sale of three packets of obscene pic-

tures to a police officer. The pictures, three of which were introduced in evidence, generally showed a nude male figure with penis in full erection. One State's exhibit was a picture of a nude male fondling his penis; another showed a starkly naked subject posed in a reclining position. The undisputed testimony was that the pictures cost about five for one cent to produce. Three packets, a total of nine pictures, were sold by the Petitioner to the policeman for $14.00.

It was testified that, assisting the police officer to make his selection of pictures, the Petitioner said helpfully, "We had one in here where the male had a very large penis". After a fruitless search, he explained that the particular picture was sold out because it was greatly in demand by women customers for purposes of exciting themselves sexually prior to consortium. In the words of the Petitioner, ". . . it was a large seller, a lot of women wanted to buy them up to heat themselves up for their husbands" (*T.T. 11).

Testifying for the State were an art professor — art consultant, concededly an expert on art, who testified that the pictures were devoid of any merit. Similar testimony was offered by a professional photographer whose qualifications as an expert in photography were admitted. The dean of an art institute, who also teaches courses in art, and an art critic, writer of a column on art for a local newspaper, whose background includes experience as the curator of an art museum, testified that the pictures lacked any artistic merit. The trial record contains uncontradicted testimony that the pictures have prurient appeal for the average person and others. The State's evidence was unrebutted, the Petitioner electing not to offer any evidence.

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* Trial transcript.

The trial judge found the pictures to be hard core pornography and obscene by any standards (T.T. 51). The Court of Special Appeals of Maryland made an independent determination that the pictures are hard core pornography (Petitioner's Brief, p. 13). The Maryland Court of Appeals denied certiorari.

ARGUMENT

I.

THE MARYLAND STATUTE FOR VIOLATION OF WHICH THE APPELLANT WAS CONVICTED IS CONSTITUTIONAL.

The Appellant was convicted for the violation of Article 27, Section 418(a) of the Annotated Code of Maryland (1957 Edition) which makes it a misdemeanor to "knowingly . . . sell . . . any lewd, obscene or indecent . . . picture . . ." (Petitioner's Brief, p. 2).

The statute withstood attack on constitutional grounds in an earlier case. *Monfred v. State,* 226 Md. 312 (1961). This Court denied certiorari, 368 U.S. 953.

Obscenity is not constitutionally protected. *Roth v. United States; Alberts v. California,* 354 U.S. 476 (1957). The majority of this Court has consistently upheld the constitutional right of a State to punish the sale of obscene material, holding that there is nothing in the Due Process Clause of the Fourteenth Amendment which forbids prosecution of the seller of pornography. Rather than any turning away from the prevailing constitutional doctrine declared in *Roth,* this Court has repeatedly affirmed the basic holding in that case.

The Petitioner's contention that the publication of material may be proscribed only when it constitutes a clear and present danger urges the Court to adopt a doctrine already considered and rejected. *Roth v. United States,*

supra. In the light of the holding that obscenity is not constitutionally protected expression, the thrust of any argument in favor of the application of the clear and present danger doctrine is ineffective. 5 A.L.R. 3rd 1172. While recognizing some minority sentiment for the adoption of other principles, the determination of obscenity in recent cases decided by this Court has turned upon the application of *Roth-Alberts* standards. *Redrup v. New York; Austin v. Kentucky; Gent v. Arkansas*, 386 U.S. 767 (1967).

II.

THE PICTURES IN THIS CASE ARE OBSCENE BY CONSTITUTIONAL STANDARDS.

The trial record reflects proof of obscenity which fully measures up to the standards described in *Roth, supra*, in *Jacobellis v. Ohio*, 378 U.S. 184 (1964), and in *Ginzburg v. United States*, 383 U.S. 463 (1966). There is ample support for the conclusion of the fact-finder that there is a coalescence of the elements to establish obscenity (1) that the pictures appeal to a prurient interest in sex, (2) that they are patently offensive, and (3) that they are utterly without any redeeming social importance. The Petitioner offered no evidence that the pictures have any quality that might be considered redemptive. Indeed, it was conceded on appeal to the Court of Special Appeals of Maryland that the pictures are utterly without redeeming social importance. Petitioner's Brief in the Court of Special Appeals, p. 5, states, "It is conceded by the Appellant that the material is without redeeming social value". The concession was duly noted by the appellate court in its affirmance of the trial court. See the opinion of the Court of Special Appeals, Petitioner's Brief, p. 13.

The pictures in the case at bar far exceed the candor of the pictures in *Manual Enterprises v. Day*, 370 U.S. 478 (1962). In that case, none of the pictures directly showed

the genitals. Models were posed with genitals obscured or with some object interposed in front of the genital area. In this case, the pictures are of flagrantly nude males exhibited with penis in full erection and, in at least one instance, fondling the organ. They are patently offensive, an erotic display going far beyond acceptable limits of candor and well deserving the hard core label impressed upon them by the courts below.

If there is any doubt of the essential nature of the pictures, the trial record reflects convincing evidence of pandering on the part of the Petitioner. He actively assisted in the selection of the pictures with the declared intention to provide those with maximum erotic appeal. He freely acknowledged that female customers sought his wares for purposes of titillation and used them to arouse themselves sexually in advance of conjugal coitus. Accordingly, the circumstances of the sale of the pictures strongly supports the conclusion that they are not constitutionally protected. *Ginzburg v. United States, supra.* Additional support for such finding lies in the vast disparity between cost and sale price and the huge profit markup.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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